IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 1999 Session

MARY C. ROBERTS, ET AL. v. SEVREN G. SANDERS, ET AL.

Appeal from the Circuit Court for Sumner County
No. 16404-C Thomas Goodall, Judge

No. M1998-00957-COA-R3-CV - Filed February 22, 2002

This appeal involves the right of a lawyer to collect a fee from the entire proceeds of a $33,000 settlement between his elderly client and the teenage driver who struck her vehicle from the rear. Upon being notified of the pending settlement, the TennCare managed care organization that had paid $12,687 of the client's medical expenses asserted its subrogation rights to a portion of the settlement and declined to pay any portion of the lawyer's fee from its share of the settlement proceeds. The Circuit Court for Sumner County recognized the managed care organization's subrogation interest in the settlement proceeds but awarded the lawyer a one-third contingent fee from these funds. On this appeal, the managed care organization takes issue with the trial court's decision to award the lawyer any attorney's fees from its subrogation interest. We have determined that the lawyer had a right under Tenn. Code Ann. § 71-5-117(c) (Supp. 2001) to collect a fee from the proceeds of the settlement and that the managed care organization failed to prove the existence of circumstances that would disentitle the lawyer to collect a portion of his fee from its subrogation interest. Accordingly, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Rhonda M. Whitted, Nashville, Tennessee, for the intervenor-appellants, Tennessee Managed Care Network / Access . . . MedPLUS.

Mark T. Smith, Gallatin, Tennessee, for the appellees, Mary C. Roberts and Alton R. Roberts.

OPINION

I.

Mary C. Roberts was injured on February 13, 1996, when an automobile being driven by 16-year-old Sevren Sanders ran a yield sign and struck the rear of her automobile. At that time, Ms. Roberts had medical insurance coverage by virtue of her membership in Access . . .MedPLUS ("Access MedPLUS"), a private managed care organization that had contracted with the State of

Tennessee to provide medical insurance under the TennCare program.[1] Access MedPLUS eventually paid $12,687 of Ms. Roberts's medical expenses stemming from the injuries she sustained when Mr. Sanders struck her automobile.

Shortly before the statute of limitations ran on her claim, Ms. Roberts hired Mark T. Smith to file a personal injury suit against Mr. Sanders and his mother, the owner of the automobile Mr. Sanders was driving when the collision occurred. Mr. Smith filed a $150,000 negligence suit against Mr. Sanders and his mother in the Circuit Court for Sumner County. After the lawsuit was filed, Ms. Roberts told Mr. Smith that TennCare had paid the medical bills for the injuries she sustained when Mr. Sanders struck her. Mr. Sanders did not, at that time, notify either the State or Access MedPLUS that Ms. Roberts had retained him to pursue her damage claim against Mr. Sanders and his mother.

The record contains no evidence that Access MedPLUS undertook to protect its subrogation interest until twenty months after the collision in which Ms. Roberts was injured. In November 1997, a "Subrogation Specialist" employed by Innovative Recovery Services, Inc. wrote a letter to Ms. Roberts on behalf of Access MedPLUS.[2] The two-fold purpose of this letter was to inform Ms. Roberts of Access MedPLUS's subrogation rights under Tenn. Code Ann. § 71-5-117 (Supp. 2001)[3] and to obtain information from Ms. Roberts regarding the persons who were responsible for her injuries.[4] In March 1998, after receiving no response to his November 1997 letter, the subrogation

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[1] Access MedPLUS is a private managed care organization that has contracted with the State of Tennessee to provide medical coverage to persons eligible to participate in the TennCare program. The operation of the TennCare program is more fully discussed in *State ex rel. Pope v. Xantus Healthplan of Tenn., Inc.*, M2000-00120-COA-R10-CV, 2000 WL 630858, at *1-3 (Tenn. Ct. App. May 17, 2000) (No Tenn. R. App. P. 11 application filed); *see also* James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) As a Case Study and a Paradigm*, 53 Vand. L. Rev. 125 (2000). Tennessee Managed Care Network, according to its pleadings, is the "administrator of claims submitted by members enrolled in the TennCare portion of Access . . . MedPlus. TMCN analyzes the claims, approves covered claims and pays medical benefits to medical providers pursuant to coverage provided to a TennCare member."

[2] Innovative Recovery Services, Inc. is a "management consulting firm." According to its Director of Health Care Client Services, it "provides subrogation services to Access in the form of research and identification of subrogable events. It then provides notice to all members, attorneys, third parties and third party insurance carriers of the subrogation rights of Access and IRSI takes all necessary actions to protect Access's subrogation interest."

[3] It is not altogether clear what the status of Access MedPLUS's subrogation rights were in November 1997 because the statute of limitations for bringing suit against those who caused Ms. Roberts's injuries had expired nine months earlier in February 1997. A subrogation cause of action arises at the same time and is governed by the same statute of limitations that governs the underlying personal injury claim. *J.F. Elkins Constr. Co. v. Naill Bros.*, 168 Tenn. 165, 167-68, 76 S.W.2d 326, 327 (1934); *Indiana Lumbermens Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 511 S.W.2d 713, 715 (Tenn. Ct. App. 1972). Access MedPLUS could not succeed, by contract, to the State's common-law right to be exempted from the operation of general statutes of limitations. *Fidelity & Deposit Co. v. First Nat'l Bank*, 165 Tenn. 395, 397, 54 S.W.2d 964, 965 (1932).

[4] Innovative Recovery Services's letter incorrectly identifies the date of the collision in which Ms. Roberts was injured as October 15, 1996 rather than February 13, 1996. While this mistaken date might provide some insight into the delay in seeking information from Ms. Roberts, it sheds no light on why Innovative Recovery Services waited until the one-year statute of limitations had elapsed before seeking the information it would have required had it decided to pursue its subrogation claim against Mr. Sanders and his mother on its own.

specialist sent Ms. Roberts a second letter informing her that "it is imperative that we receive the requested information" and requesting that she provide the information "no later than two (2) weeks from the date of this letter."[5] Ms. Roberts did not respond to this letter and did not inform Mr. Smith of either letter.[6] Innovative Recovery Services apparently let the matter drop after Ms. Roberts did not respond to its March 1998 letter.

Mr. Smith eventually negotiated a $33,000 settlement of Ms. Roberts's claim against Mr. Sanders and his mother. On May 10, 1998, he requested Innovative Recovery Services to provide him with the amount of the medical expenses Access MedPLUS had paid on Ms. Roberts's behalf. By letter dated May 12, 1998, a "Subrogation Representative" employed by Innovative Recovery Services informed Mr. Smith that Access MedPLUS had paid $12,687 to Ms. Roberts's healthcare providers and that Access MedPLUS's "interest is being protected by Innovation [sic] Recovery Services, Inc. (IRSI). IRIS [sic] [b]elieves it is entitled to receive the full amount of the proceeds paid by TMCN on behalf of Ms. Roberts."

Following his receipt of the letter from Innovative Recovery Services, Mr. Smith filed a motion to impress a lien for his fees on the portion of the settlement proceeds set aside for Access MedPLUS's subrogation claim. On June 11, 1998, the trial court entered an order of compromise and settlement reciting that Ms. Roberts and her husband had agreed to settle their claims against Mr. Smith and his mother for $33,000. The order directed that $20,313.10 be paid over to Ms. Roberts and her husband and that $12,687 be held by the trial court clerk pending a determination of Mr. Smith's claim for attorney's fees for his recovery of these payments.

Immediately after the entry of the order of compromise and settlement, Access MedPLUS intervened in the proceeding to oppose Mr. Smith's claim for an attorney's fee from its subrogation interest. On August 28, 1998, the trial court entered an order finding that Mr. Smith was entitled to collect an attorney's fee from Access MedPLUS's subrogation interest under Tenn. Code Ann. § 71-5-117(c) even though no "specific" contract for legal representation existed between Access MedPLUS and Mr. Smith. Accordingly, the trial court awarded Mr. Smith one-third of the $12,687 being held by the trial court clerk. Access MedPLUS has appealed from the trial court's decision to award Mr. Smith attorney's fees.

II.
PAYMENT OF ATTORNEY'S FEES UNDER TENN. CODE ANN. § 71-5-117(C)

This dispute does not involve the existence or the reasonableness of Mr. Smith's contingent fee agreement with Ms. Roberts or whether Mr. Smith has provided professional services that entitle him to compensation in accordance with his agreement. There is no disagreement that Mr. Smith and Ms. Roberts entered into a standard contingent fee agreement or that Mr. Smith provided professional services pursuant to that agreement or that Mr. Smith is entitled to compensation under the terms of that agreement. This dispute involves whether Ms. Roberts must pay the full amount

[5] Like the earlier letter, this letter also misidentified the "date of accident" as October 15, 1996.

[6] Mr. Smith did not learn of the letters until after the settlement when the subrogation dispute with Access MedPLUS arose.

of Mr. Smith's fee from her share of the settlement or whether Access MedPLUS must also pay a portion of Mr. Smith's fee from its share of the settlement proceeds.

Mr. Smith asserts that Tenn. Code Ann. § 71-5-117(c) entitles him to collect a portion of his attorney's fee from Access MedPLUS's share of the settlement proceeds. Specifically, he relies on the language in Tenn. Code Ann. § 71-5-117(c) stating that "[t]he right of subrogation by the state to the recipient's right to recovery shall be subject to ordinary and reasonable attorney fees . . .." For its part, Access MedPLUS, reading this provision much more narrowly, argues that it authorizes the payment of attorney's fee only to the lawyers that either it or the State of Tennessee has retained. Accordingly, the threshold issue is the purpose and effect of Tenn. Code Ann. § 71-5-117(c).

A.

The responsibility for determining what a statute means rests with the courts. *Roseman v. Roseman*, 890 S.W.2d 27, 29 (Tenn. 1994); *Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 601 (Tenn. Ct. App. 1999). We must ascertain and then give the fullest possible effect to the General Assembly's purpose in enacting the statute as reflected in the statute's language. *Stewart v. State*, 33 S.W.3d 785, 790-91 (Tenn. 2000); *Lavin v. Jordon*, 16 S.W.3d 362, 365 (Tenn. 2000). In doing so, we must avoid constructions that unduly expand or restrict the statute's application. *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62 S.W.3d 213, 218 (Tenn. 2001); *Patterson v. Tennessee Dep't of Labor & Workforce Dev.*, 60 S.W.3d 60, 64 (Tenn. 2001); *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001). Our goal is to construe a statute in a way that avoids conflict and facilitates the harmonious operation of the law. *Frazier v. East Tenn. Baptist Hosp.*, 55 S.W.3d 925, 928 (Tenn. 2001); *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000).

Our construction of a statute is more likely to conform with the General Assembly's purpose if we approach the statute presuming that the General Assembly chose its words purposely and deliberately, *Tidwell v. Servomation-Willoughby Co.*, 483 S.W.2d 98, 100 (Tenn. 1972); *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 151 (Tenn. Ct. App. 2001), and that the words chosen by the General Assembly convey the meaning the General Assembly intended them to convey. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d at 83; *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Thus, we must construe statutes as we find them, *Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948); *Pacific Eastern Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 954 (Tenn. Ct. App. 1995), and our search for a statute's purpose must begin with the words of the statute itself. *Blankenship v. Estate of Bain*, 5 S.W.3d 647, 651 (Tenn. 1999); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, ___ S.W.3d ___, ___, 2001 WL 775607, at *12 (Tenn. Ct. App. 2001).

We must give a statute's words their natural and ordinary meaning unless the context in which they are used requires otherwise. *Frazier v. East Tenn. Baptist Hosp.*, 55 S.W.3d at 928; *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *State v. Fitz*, 19 S.W.3d 213, 216 (Tenn. 2000). Because words are known by the company they keep, *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 2001 WL 775607, at *12, we should construe the words in a statute in the context of the entire statute and in light of the statute's general purpose. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994); *Wachovia Bank of N.C. v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000). When the meaning of statutory language is clear, we must interpret it as written, *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749

(Tenn. 2001); *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 629-30 (Tenn. 2000), rather than using the tools of construction to give the statute another meaning. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d at 83; *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000).

Statutes, however, are not always free from ambiguity. When we encounter ambiguous statutory language – language that can reasonably have more than one meaning[7] – we must look to the entire statute, the entire statutory scheme in which the statute appears, and elsewhere to ascertain the General Assembly's intent and purpose. *State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *State v. McKnight*, 51 S.W.3d 559, 566 (Tenn. 2001). One of the sources that we frequently look to for guidance is the statute's legislative history. *Bowden v. Memphis Bd. of Educ.*, 29 S.W.3d 462, 465 (Tenn. 2000); *Hathaway v. First Family Fin. Servs.*, 1 S.W.3d 634, 640 (Tenn. 1999); *Reeves-Sain Med., Inc. v. BlueCross BlueShield of Tenn.*, 40 S.W.3d 503, 507 (Tenn. Ct. App. 2000). We must be cautious about consulting legislative history. *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d at 673. A statute's meaning must be grounded in its text. Thus, comments made during the General Assembly's debates cannot provide a basis for a construction that is not rooted in the statute's text. *D. Canale & Co. v. Celauro*, 765 S.W.2d 736, 738 (Tenn. 1989); *Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 453 n.6 (Tenn. Ct. App. 2001). When a statute's text and the comments made during a legislative debate diverge, the text controls. *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d at 674.

The tasks of statutory construction and applying a statute to a particular set of facts involve questions of law rather than questions of fact. *Patterson v. Tennessee Dep't of Labor and Workforce Dev.*, 60 S.W.3d at 62; *State v. McKnight*, 51 S.W.3d at 562; *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998). Accordingly, appellate courts must review a trial court's construction of a statute or application of a statute to a particular set of facts de novo without a presumption of correctness. *State v. Walls*, 62 S.W.3d at 121; *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000); *Mooney v. Sneed*, 30 S.W.3d at 306.

B.

This appeal does not mark the first time that this court has dealt with a claim for attorney's fees by a lawyer representing a TennCare recipient. It is, however, the first appeal that requires us to focus specifically on the meaning of Tenn. Code Ann. § 71-5-117(c). In the previous cases, the issues raised and the rationale for our decisions obviated the need to focus on Tenn. Code Ann. § 71-5-117(c).[8] If anything, the statute was mentioned only in passing in these earlier cases.

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[7] *LeTellier v. LeTellier*, 40 S.W.3d 490, 498 (Tenn. 2001); *Bryant v. HCA Health Servs. of N. Tenn., Inc.*, 15 S.W.3d 804, 809 (Tenn. 2000).

[8] *Blankenship v. Estate of Bain*, No. 01A01-9709-CV-00492, 1998 WL 426981 (Tenn. Ct. App. July 29, 1998), *rev'd*, 5 S.W.3d 647 (Tenn. 1999) (discussing the application of the "made whole" doctrine to subrogation claims); *Green v. Innovative Recovery Servs., Inc.*, 42 S.W.3d 917 (Tenn. Ct. App. 2000) (holding that a TennCare recipient could not assert the "made whole" doctrine for the first time on appeal); *Nelson v. Innovative Recovery Servs., Inc.*, No. M2000-03109-COA-R3-CV, 2001 WL 1480515 (Tenn. Ct. App. Nov. 21, 2001) (No Tenn. R. App. P. 11 application filed) (declining to give effect to the TennCare recipient's "made whole" defense to the subrogation claim because the recipient had not proved that she had not been made whole by the settlement); *Brown v. Nowlin*, No. W2001-01455-COA-R3-CV, 2001 WL 1584155 (Tenn. Ct. App. Nov. 30, 2001) (No Tenn. R. App. P. 11 application filed) (declining (continued...)

We turn first to the text of Tenn. Code Ann. § 71-5-117(c) itself. The language of this provision clearly subjects the State's subrogation rights to "ordinary and reasonable attorney fees." It does not expressly limit these "attorney fees" to fees being charged by government lawyers or by private lawyers retained by the State or some other private party to protect the subrogation interests under Tenn. Code Ann. § 71-5-117(a).

We presume that the Tennessee General Assembly intended to use the phrase "attorney fees," or more properly "attorney's fees,"[9] in the way consistent with its generally understood meaning. In common parlance, "attorney's fees" refers to the consideration that a litigant actually pays or becomes liable to pay in exchange for representation by a legal professional in a particular proceeding. Access MedPLUS's interpretation of Tenn. Code Ann. § 71-5-117(c) would have considerable weight if persons could become liable for attorney's fees only by contracting directly with the lawyer providing the professional services. However, any number of circumstances exist in which persons who did not contract directly with a lawyer may be required to pay all or part of a lawyer's fees. As we shall presently see, subrogation proceedings are among these circumstances. Accordingly, in light of the general, unrestricted language of the statute, we decline to hold that the phrase "attorney fees" that appears in Tenn. Code Ann. § 71-5-117(c) includes only those fees charged by a lawyer employed or retained by the State or any other entity pursuing a subrogation claim under Tenn. Code Ann. § 71-5-117(a).

C.

The scope of the language of the first sentence of Tenn. Code Ann. § 71-5-117(c) is not clear on its face because it can reasonably be interpreted in more than one way. In the previous section, our analysis of the text of Tenn. Code Ann. § 71-5-117(c) demonstrated that the phrase "attorney fees" was not necessarily limited to fees being charged by lawyers employed or retained by the State or any other entity to protect the subrogation interest in a Medicaid recipient's recovery from a third party. However, ruling out a narrow interpretation of Tenn. Code Ann. § 71-5-117(c) does not fully elucidate why the Tennessee General Assembly included the first sentence of Tenn. Code Ann. § 71-5-117(c) in the statute. Therefore, to find these reasons, we turn to the statute's legislative history.

The Social Security Act of 1965 contained two of President Lyndon B. Johnson's "Great Society" programs. Title XVIII of the Act created the Medicare program, a federal insurance program intended to protect persons over sixty-five years of age from the rising costs of medical care. The program is funded by a combination of federal general tax revenues, federal payroll taxes, and enrollee payments. Title XIX of the Act created the Medicaid program, a federal-state program intended to ensure access to health care for persons with low incomes and limited resources. This program is jointly funded by the federal government and the state governments. While each state operates its own Medicaid program, each state must conform to federal requirements in order to receive federal matching funds. This case involves Tennessee's Medicaid program.

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[8](...continued)
to address Tenn. Code Ann. § 71-5-117 because the TennCare recipient's lawyer was not seeking a fee out of Access MedPLUS's subrogation portion of the recovery).

[9]Bryan A. Garner, *A Dictionary of Modern Legal Usage* 91 (2d ed. 1995).

Tennessee began participating in the Medicaid program when the General Assembly enacted the Medical Assistance Act of 1968.[10] This Act defined the persons who were eligible to receive Medicaid benefits and also prescribed the medical services that Medicaid would pay for. It permitted the State to recover Medicaid payments from recipients in extremely limited circumstances. First, it permitted the State to recover payments that had been paid "incorrectly."[11] Second, it permitted the State to recover "correctly paid" payments, but only from the estates of persons who were over sixty-five years old when they received the medical services and then, only if the recipient left no surviving spouse or a child under the age of twenty-one or blind or permanently and totally disabled.[12]

By 1980, Tennessee was spending more than $400 million on its Medicaid program. Both the federal government and the states were becoming increasingly concerned about the skyrocketing costs of the program and were searching for ways to control these costs. Up to this point, the states had not been aggressively seeking reimbursement for Medicaid payments from third parties who were liable for these payments. Accordingly, the Tennessee General Assembly, in an effort to contain costs and to comply with federal guidelines and regulations,[13] amended the Medical Assistance Act of 1968 by adding provisions to enhance the State's ability to recover Medicaid payments from third parties.

The 1980 amendments to the Medical Assistance Act of 1968[14] included a provision requiring recipients of Medicaid benefits to assign "any right of third party insurance benefits" to the State. Tenn. Code Ann. § 71-5-117(b). They also included a provision giving the State a statutory right of subrogation to any recovery or potential recovery the Medicaid recipient might have from a third party. Tenn. Code Ann. § 71-5-117(a).[15]

The bill, as it was originally introduced, did not address the question of attorney's fees with regard to the State's subrogation interest. However, the House Judiciary Committee, approved an amendment dealing with attorney's fees offered by Representative Frank Buck, a lawyer from Dowelltown. The amendment stated:

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[10] Act of Apr. 3, 1968, ch. 551, 1968 Tenn. Pub. Acts 496 (codified as amended at Tenn. Code Ann. §§ 71-5-101, -119 (1995 & Supp. 2001)).

[11] Tenn. Code Ann. § 14-1917 (1973).

[12] Tenn. Code Ann. § 14-1916 (1973).

[13] The Medicare-Medicaid Anti-Fraud Amendments enacted by Congress in 1977 required state plans for medical assistance to include provisions enabling the state to seek reimbursement from third parties who are legally liable for the care and services available through Medicaid, 42 U.S.C.A. § 1396a(a)(25)(B) (West Supp. 2001) and requiring persons seeking Medicaid benefits to assign to the state any rights they might have to require a third party to pay for their medical care. 42 U.S.C.A. § 1396k(a)(1)(A) (West 1992).

[14] Act of Feb. 28, 1980, ch. 535, 1980 Tenn. Pub. Acts 230 (codified at Tenn. Code Ann. § 7-5-117 (Supp. 2001).

[15] Tenn. Code Ann. § 71-5-117(a) states: "To the extent of payments of medical assistance, the state shall be subrogated to all rights of recovery, for the cost of care or treatment for the injury or illness for which medical assistance is provided, contractual or otherwise, of the recipients against any person."

> The right of subrogation by the state to the recipient's right to recovery shall be subject to ordinary and reasonable attorney fees; provided, that further, where the recipient has retained an attorney, the attorney shall not be considered liable unless the attorney has notice from the state of the state's claim of subrogation prior to disbursement of the funds to the recipient.

When the House Calendar and Rules Committee considered the bill on January 24, 1980, Representative Buck offered the following explanation of his amendment:

> Gentlemen, for the benefit of the committee, what this does is when an individual has a car wreck and he receives Medicaid benefits, under the current law, if he recovers off the party who is at fault for the wreck, Medicaid – the State of Tennessee – has no way to recover their out-of-pocket expenses, that is the medical bills. What this bill does is permit the State to give notice to the injured party's attorney and say, "Look, we paid you certain medical benefits under the Medicaid program, and if you make a recovery against that third party who is at fault, we are entitled to have our money back." It is subject to attorney fees. But it's not like private insurance. Private insurance is paid by an individual out of his own pocket, but Medicaid benefits are paid by the taxpayers. And it seems to me that the taxpayers ought to be entitled to have it back. In other words, the injured individual ought not recover twice for the same injury.

The purpose of Representative Buck's amendment was again discussed when the House of Representatives considered the bill on January 30, 1980. During the floor debate following the adoption of Representative Buck's amendment,[16] the members discussed the circumstances when either the State or the Medicaid recipient hires a lawyer to seek a recovery from a third party:

> REP. PICKERING:[17] Thank you, Mr. Speaker. I would like to ask the sponsor a question if he would yield. Then, I probably want to make a couple of comments. This amendment that was put on . . . does this require the recipient of any aid under Medicare [sic] to pay the attorney's fees, or does it require the State to pay the attorney's fees?
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> REP. MOORE:[18] The recipient, if they get an attorney.
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> REP. PICKERING: It requires the recipient to pay the attorney's fees?

[16] Amendment No. 1 to House Bill 1676, 1 House Journal 2280 (91st Gen. Assem. 1980).

[17] Representative G. Roscoe Pickering from Adams.

[18] Representative U.A. Moore from Millington.

REP. MOORE: Out of the fees.

REP. PICKERING: To recover money for the State?

REP. MOORE: When, if the State . . . We will use our attorney generals. We will use our staff. It will not require any fees. If that individual goes to a lawsuit, they themselves will be the ones, if they require the lawsuit, who will need the fees. But if . . . the State is trying to reclaim [the Medicaid payments], we will use our own staff, our own people, and there will not be an attorney's fee on that. Only in the cases where the individual recipient hires the attorney, will it be paid by the recipient.

REP. PICKERING: What reason would the recipient need for an attorney under those conditions?

REP. MOORE: If that recipient would file a lawsuit and he feels like he's got just damages against the automobile wreck, the State's not going to hire him an attorney to do this. They're getting paid. Now, if they [the recipients] hire an attorney themselves to represent them, and they receive payment for that, then they will be paying the Medicaid also. They will pay the Medicaid benefits that they received from the money that they received. But . . . the State will not be requiring them to sue.

* * *

REP. BUCK: Mr. Speaker and members of the House. I just want to point out one thing. . . Medicaid in this case is paid by state tax dollars, and, therefore, if this individual person recovers from a car wreck or whatever and recovers from the insurance company, the medical bills that have been paid by the State of Tennessee, the State of Tennessee ought to be entitled to get their share back. It's that simple. Medicaid is not funded through private premiums. It's funded out of tax dollars. And it's a good bill. I urge you to vote for it. I think it's fair.

SPEAKER: Representative Bewley.

REP. BEWLEY:[19] Thank you, Mr. Speaker. U.A., if a person has insurance above Medicaid and pays the premiums, this in no way touches that?

[19] Representative Joe L. Bewley from Greeneville.

REP. MOORE: If he as that, he wouldn't be entitled to Medicaid. What this bill says [is] that if the insurance premium that he's paid for, hospitalization or whatever it might be, in this situation, they will pay before the Medicaid pays. It's what this amounts to.

REP. BEWLEY: Thank you, sir.

SPEAKER: Representative . . . Do you conclude Representative Bewley? Representative Small.

REP. SMALL:[20] Thank you, Mr. Speaker. I believe Representative Pickering's concern is unfounded and actually the exact opposite would result. Representative Pickering is concerned that his constituent or the injured party would have to pay an attorney fee if this amendment is passed. Actually, when his constituent will go to an attorney, he agrees to pay that attorney a percentage of what's recovered anyway. So if there's some part of the medical expenses are repaid by Medicare [sic], then the attorney's entitled to a percentage, usually a third, of what is recovered including that Medicaid payment. Now, under this amendment, it would simply say that [the] part going back to the State would be subject to the same attorney's fee that the part retained by the injured party [would be subject to]. Now, if this . . . amendment is not passed, the injured party . . . would have to pay the entire one-third . . . [attorney's fee] out of the part of the recovery that he received. Thus, the State would come out whole, but the individual would lose because he would have to absorb the extra attorney fees. I think that the amendment is good, and certainly I believe if Mr. Pickering would reconsider, he would like the amendment. I think it's a good amendment and ought to be passed.

SPEAKER: Representative Smith.

REP. SMITH:[21] Representative Moore, I feel a distinct cold wind blowing on this bill. Why don't you just roll it over for a couple of days til you can get the kinks worked out of it?

SPEAKER: Representative Rhinehart.

REP. RHINEHART:[22] Mr. Speaker, ladies and gentlemen of the House. This bill really doesn't change anything. Every provider of

[20]Representative Neal Small, a lawyer from Memphis.

[21]Representative Loy L. Smith, an insurance agent from Knoxville.

[22]Representative Shelby A. Rhinehart, a pharmacist from Spencer.

> Medicaid has to put on the Medicaid form if there's a third party involved, that's insurance or any other thing. Now, as I understand the amendment, the lawyers want to get their cut first. That doesn't make any difference to me. But this is already a Medicaid regulation, and it has to be done. So, I can't see all the flack over the bill. Now that the lawyers have got their cut, why let's pass the amendment and go ahead and pass the bill.

On January 30, 1980, the House of Representatives passed the bill with Representative Buck's amendment. The Senate amended the House Bill and passed it on February 21, 1980, and the House concurred in the Senate's amendments on February 28, 1980. Thereafter, Representative Buck's amendment was codified as Tenn. Code Ann. § 71-5-117(c).

The debate in the House of Representatives on January 30, 1980, demonstrates that the General Assembly set out to give the State a statutory subrogation interest in any recovery a Medicaid recipient might obtain or be entitled to obtain from a third party. This subrogation interest was limited to the "payments of medical assistance" actually made by the Medicaid program.

The debate also demonstrates that the General Assembly understood that the State's subrogation interest could be protected in two ways. First, the State itself could pursue its subrogation rights directly against the third parties who are responsible for the payment of the medical expenses. If the State elected to pursue its own subrogation rights, the Medicaid recipient would not be responsible for the State's attorney's fees. Second, the State could elect not to pursue its subrogation rights and, instead, rely on the private attorney retained by the Medicaid recipient to do so. If the State chose not to pursue its subrogation rights and the Medicaid recipient's lawyer obtained a recovery from the third party, the General Assembly, as reflected in the comments of Representatives Buck, Rhinehart, and Small, understood that the recipient's lawyer would be entitled to collect part of his or her fee from the portion of the recovery representing the State's subrogation interest.[23] It is abundantly clear that the General Assembly did not envision that Medicaid recipients would be forced to bear the expense of protecting the State's subrogation interest.

D.

Judging from the lack of litigation involving the operation of Tenn. Code Ann. § 71-5-117(c) between 1980 and 1998, there must have been little controversy involving the operation of the attorney's fee provision as long as the State was administering its Medicaid program. However, this changed after January 1, 1994, when Tennessee replaced its traditional Medicaid program with a five-year demonstration project called TennCare. With the advent of TennCare, Tennessee replaced its state-run entitlement program with a new mandatory managed care system. Under the TennCare program, the State contracts with private managed care organizations that agree to provide necessary medical services to their members for a fixed payment per recipient per month. All persons desiring to obtain Medicaid benefits must enroll as members of one of these private managed care organizations. In 1997, the Tennessee General Assembly authorized the State to contract with the

[23] As Representative Rhinehart observed, the Medicaid recipient's private lawyer would be entitled to collect his fee from the gross amount of the recovery, and then the recipient and the State would divide the remaining amount of the recovery by prorating the amount of the State's subrogation interest and the total amount of the recovery.

private TennCare managed care organizations to pursue the statutory subrogation rights under Tenn. Code Ann. § 71-5-117(c).[24]

The private managed care organizations soon discovered that it was in their financial interest to resist paying attorney's fees to the private lawyers who were representing TennCare recipients in actions against third parties. Accordingly, both cooperation and communication broke down after these managed care organizations declined to permit these lawyers to deduct a portion of their fee from TennCare's statutory subrogation interest. In response, the private lawyers argued that neither the State nor the private managed care organizations were entitled to any subrogation when the proceeds of the litigation against the third party failed to make the TennCare recipient whole. Eventually, in 1999, the Tennessee Supreme Court held that the "made whole" doctrine applied to TennCare subrogation claims and, therefore, that the State was not entitled to collect its subrogation interest in a TennCare recipient's recovery from a third party unless the recipient had been "made whole." *Blankenship v. Estate of Bain*, 5 S.W.3d at 651.

The Tennessee Supreme Court's decision in *Blankenship v. Estate of Bain* eventually caused the Tennessee General Assembly to revisit the procedure for paying the attorney's fees authorized by Tenn. Code Ann. § 71-5-117(c). In 2000, the General Assembly amended Tenn. Code Ann. § 71-5-117 to replace the "made whole" doctrine, at least as it applied to TennCare's statutory subrogation rights, with a procedure for calculating and paying the attorney's fees authorized in Tenn. Code Ann. § 71-5-117(c).[25]

The procedure now specifically required by Tenn. Code Ann. § 71-5-117(g)-(k) is essentially the same procedure described by Representatives Buck, Rhinehart, and Small during the 1980 floor debates when the General Assembly enacted Tenn. Code Ann. § 71-5-117(c).[26] It requires that the "reasonable attorneys' fees and litigation costs incurred by the plaintiff [TennCare recipient] in obtaining the recovery" shall be deducted from the amount of the State's subrogation interest and that the remaining funds, called the "net subrogation interest," shall be paid over to the State or its "assignee" under Tenn. Code Ann. § 71-5-117(f).

E.

As a general matter, TennCare recipients are not required to bear the expense of recovering the State's statutory subrogation interest under Tenn. Code Ann. § 71-5-117(a) from third parties. Tenn. Code Ann. § 71-5-117(c), viewed in light of the legislative history surrounding both its enactment in 1980 and the enactment of related legislation in 2000, permits a lawyer representing a TennCare recipient to insist that a portion of his or her fee be paid from the State's subrogation interest in the proceeds from any recovery from a third party. In effect, it places a lawyer

[24] Act of April 7, 1997, ch. 102, 1997 Tenn. Pub. Acts 172 (codified at Tenn. Code Ann. § 71-5-117(f)).

[25] Act of May 17, 2000, ch. 807, 2000 Tenn. Pub. Acts 2297 (codified at Tenn. Code Ann. § 71-5-117(g)-(k)).

[26] The differences in the procedures in Tenn. Code Ann. § 71-5-117(g)-(k) and those discussed in 1980 can be attributed to adjustments required by the Tennessee Supreme Court's 1992 decision to replace the doctrine of contributory negligence with a system of modified comparative fault. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

representing a TennCare recipient on the same footing as a lawyer whose client has private insurance. Accordingly, it remains to be decided whether Access MedPLUS has demonstrated that Ms. Roberts's lawyer is not entitled to collect a portion of his fee from its $12,687 subrogation interest in the proceeds from the settlement with Mr. Sanders and his mother.

III.
MR. SMITH'S RIGHT TO COLLECT A PORTION OF HIS FEE FROM THE STATUTORY SUBROGATION INTEREST

Access MedPLUS argues that, notwithstanding Tenn. Code Ann. § 71-5-117(c), Mr. Smith should not be permitted to collect any portion of his fee from its $12,687 subrogation interest. Invoking *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587 (Tenn. 1976), Access MedPLUS asserts Mr. Smith should look only to Ms. Roberts for his fee because it notified him that it was looking out for its own subrogation interest. We find this argument unconvincing both under common-law principles and under Tenn. Code Ann. § 71-5-117(g)-(k).

A.

Tennessee follows the "American Rule" with regard to awarding attorney's fees. Under the American Rule, litigants are responsible for their own attorney's fees no matter "however wrongful may have been the suit, or however groundless the defense." *Corinth Bank & Trust Co. v. Security Nat'l Bank*, 148 Tenn. 136, 154, 252 S.W. 1001, 1006 (1923). Each litigant must wage its own fight for justice with its own resources. James H. Cheek, III, Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie,* 20 Vand. L. Rev. 1216, 1221 (1967). Thus, in the absence of some statutory, contractual, or equitable ground, a litigant must pay for its own lawyer and, conversely, cannot be required to pay for another litigant's lawyer. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *Kultura, Inc. v. Southern Leasing Corp.*, 923 S.W.2d 536, 540 (Tenn. 1996); *Brooks v. Lambert*, 15 S.W.3d 482, 485 (Tenn. Ct. App. 1999).

Viewed from a lawyer's perspective, the American Rule requires lawyers to look chiefly to their own clients for payment even when their work benefits persons other than their clients. *Hobson v. First State Bank*, 801 S.W.2d 807, 809 (Tenn. Ct. App. 1990); *Draper v. Draper*, 24 Tenn. App. 548, 553, 147 S.W.2d 759, 762 (1940). However, despite its general application, the American Rule has never been viewed as an absolute bar to shifting attorney's fees. Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 Ind. L. Rev. 313, 314 (1998) ("Parker").

One of the most well-recognized exceptions to the American Rule is the common fund doctrine. The common fund doctrine provides that a private plaintiff, or the plaintiff's lawyer, whose efforts create, discover, increase, or preserve a fund from which others may benefit is entitled to recover the costs of the litigation, including attorney's fees, from the fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621 (1975); *Gilpin v. Burrage*, 188 Tenn. 80, 89, 216 S.W.2d 732, 736 (1948); *Hobson v. First State Bank*, 801 S.W.2d at 809 (quoting *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)). It is an equitable vehicle for providing compensation for the legal work done to create the fund, *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997), and for spreading the burden of the litigation expenses among those who

have benefitted from the litigant's efforts. *Pennington v. Divney*, 182 Tenn. 207, 211-12, 185 S.W.2d 514, 516 (1945) (stating that the beneficiaries of legal services may equitably be required to pay ratably for the legal services rendered to them).[27] It rests on the perception that persons who obtain a benefit from a lawsuit without contributing to its costs are unjustly enriched at the active litigant's expense. *Boeing Co. v. Van Gemert*, 444 U.S. at 478, 100 S. Ct. at 749; *Travelers Ins. Co. v. Williams*, 541 S.W.2d at 590; *Martino v. Dyer*, No. M1999-02397-COA-R3-CV, 2000 WL 1727778, at *6 (Tenn. Ct. App. Nov. 22, 2000) (No Tenn. R. App. P. 11 application filed).[28]

The common fund doctrine can be invoked only when there is a fund within the court's jurisdiction from which fees can be awarded. *Southern v. Beeler*, 183 Tenn. 272, 301-02, 195 S.W.2d 857, 870 (1946); *Martino v. Dyer*, 2000 WL 1727778, at *7; *Montcastle v. Baird*, 723 S.W.2d 119, 123 (Tenn. Ct. App. 1986). In addition, even when such a fund exists, the doctrine should be applied only when (1) the class of persons benefitted by the lawsuit is small in number and easily identifiable, (2) the benefits can be traced with some accuracy, and (3) the costs of the litigation can be shifted with some exactitude to those benefitting. *Boeing Co. v. Van Gemert*, 444 U.S. at 478-79, 100 S. Ct. at 749; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 264 n.39, 95 S. Ct. at 1625 n.39; *Brzonkala v. Morrison*, 272 F.3d 688, 691 (4th Cir. 2001); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 271.

However, a person is ordinarily not required to pay for benefits that were thrust on him or her with no opportunity to refuse them. The fact that a person benefits from unwanted services is not necessarily enough to require that person to pay for the unwanted services. John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183, 1198 (1966) ("Wade"). Thus, invoking the common fund doctrine can trigger a separate application of the unjust enrichment doctrine – that officious intermeddlers who intrude into another person's affairs may not recover for their trouble. Wade, 19 Vand. L. Rev. at 1183-84; Robert A. Long, Jr., Note, *A Theory of Hypothetical Contract*, 94 Yale L.J. 415, 417 (1984).

Accordingly, the Tennessee Supreme Court has declined to invoke the common fund doctrine to shift part of the burden of a litigant's attorney's fee to other claimants of the fund who have retained their own lawyer and whose lawyer is actively protecting their interests. *Travelers Ins. Co.*

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[27] *See also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989); *Blue Cross Blue Shield of Ala. v. Freeman*, 447 So. 2d 757, 758 (Ala. Civ. App. 1983); *In re Estate of Brandon*, 902 P.2d 1299, 1319 n.23 (Alaska 1995); *Community Care Ctrs., Inc. v. Indiana Family & Soc. Servs. Admin.*, 716 N.E.2d 519, 543 (Ind. Ct. App. 1999); *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981); *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 126 (Tex. App. 1995); 10 Charles A. Wright, et al., *Federal Practice and Procedure* § 2675, at 322-24 (3d ed. 1998).

[28] *See also Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986); *In re Lloyd Sec., Inc.*, 183 B.R. 386, 397 (E.D. Pa. 1995); *Friedrich v. Fidelity Nat'l Bank*, 545 S.E.2d 107, 108 (Ga. Ct. App. 2001). The courts have recognized that, as a practical matter, litigants oftentimes cannot advance their own interests without advancing the interests of others and that those benefitting from the litigant's efforts generally have little incentive to help defray the litigant's expenses. Accordingly, the courts devised the common fund doctrine to address what economists refer to as the free rider problem. A free rider is someone who receives a benefit from another's work but pays nothing in return. David C. Colander, *Economics* 118 (3d ed. 1998); William D. Rolf, Jr., *Introduction to Economic Reasoning* 280 (4th ed. 1999). We have characterized the free rider problem as "coattailing." *Wheeler v. Burley*, No. 01A01-9701-CV-00006, 1997 WL 528801, at *5 (Tenn. Ct. App. Aug. 27, 1997), *perm. app. denied* (Tenn. Apr. 13, 1998); *Hobson v. First State Bank*, 801 S.W.2d at 810.

v. Williams, 541 S.W.2d at 590 (finding that the insured's lawyer was acting as a "volunteer" and declining to apply the common fund doctrine to an insurer that was already pursing its subrogation interest with the tortfeasor's insurer when the plaintiff filed suit).[29] The basis for this decision is that these claimants are not taking a free ride on the efforts of the active litigant or the litigant's lawyer because they are incurring their own expenses to create, discover, increase, or preserve the common fund.

Claimants soon discovered that they could use the "officious intermeddler" theory to "purchase immunity" from the common fund doctrine by hiring a lawyer and then by having their lawyer do little or nothing to further the litigation. *Vincent v. Hughes Air West, Inc.*, 557 F.2d at 771; John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1649 (1974) ("Dawson"). The courts were not fooled and continued to apply the common fund doctrine to claimants who sat on the sidelines until very late in the game or who employed lawyers who contributed little to the creation, discovery, increase, or preservation of the fund. *Boston, Bates & Holt v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d at 35 (applying the common fund doctrine when the insurance company had taken only minimal steps to protect its subrogation interests and had not participated in the litigation); *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 584, 177 S.W.2d 351, 356 (1944) (approving an attorney's fee from the share of a beneficiary who did not appear in the litigation).

In circumstances where other claimants have retained lawyers, the courts have decided whether these claimants are entitled to be exempted from the application of the common fund doctrine by examining the work performed by the claimants' lawyers and by determining whether their work led to the creation, discovery, increase, or preservation of the common fund. The courts have consistently declined to exempt claimants from the common fund doctrine when the contributions of the original or lead lawyer are significantly greater than those of the lawyer hired by the other claimant or claimants. *United States v. Tobias*, 935 F.2d 666, 668 (4th Cir. 1991); *Vincent v. Hughes Air West, Inc.*, 557 F.2d at 772; *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981); *Lancer Corp. v. Murillo*, 909 S.W.2d at 128-29. Thus, this court has consistently applied the common fund doctrine when we have determined that the original or lead lawyer performed a "lion's share" of the work. *PST Vans, Inc. v. Reed*, No. E1999-01963-COA-R3-CV, 1999 WL 1273517, at *3-4 (Tenn. Ct. App. Dec. 28, 1999) (No Tenn. R. App. P. 11 application filed); *Wheeler v. Burley*, 1997 WL 528801, at *4-5; *In re Estate of Stout*, No. 01A01-9308-CH-00360, 1994 WL 287765, at *4 (Tenn. Ct. App. June 29, 1994) (No Tenn. R. App. P. 11 application filed); *Hobson v. First State Bank*, 801 S.W.2d at 810-12.[30]

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[29]The Tennessee Supreme Court may have overstated the "officious intermeddler" principle when it observed that the common fund doctrine "never" applies to persons who have employed their own lawyer to represent their own interests. *Travelers Ins. Co. v. Williams*, 541 S.W.2d at 590. This court has since applied the common fund doctrine in circumstances where some or all of the other beneficiaries of the common fund had retained counsel. *E.g.*, *Wheeler v. Burley*, 1997 WL 528801, at *5.

[30]When one or more lawyers have contributed to the creation, discovery, increase, or preservation of the common fund, this court has invoked the common fund doctrine but has apportioned the fee between the lawyers. *Wheeler v. Burley*, 1997 WL 528801, at *5; *see also Kline v. Kline*, No. E2000-01890-COA-R3-CV, 2001 WL 125947, at *3 (Tenn. Ct. App. Feb. 15, 2001), *perm. app. granted* (Tenn. Sept. 10, 2001) (granting the Tenn. R. App. P. 11 application for permission to appeal to resolve the dispute among the members of the panel over the right of the (continued...)

B.

Courts now routinely apply the common fund doctrine in cases where an insurance company has a subrogated interest in the proceeds of its insured's claim against a third party. When an insurance company lays claim to subrogation proceeds, obviously someone has to collect them, and lawyers rarely work for free. *Guiel v. Allstate Ins. Co.*, 756 A.2d 777, 780 (Vt. 2000). It would be grossly inequitable to expect an insured or other claimant, in the process of protecting its own interest, to protect the interests of the insurance company as well and still pay his or her lawyer out of the funds left over after deducting the insurance company's subrogated interest. 8A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 4903.85, at 335 (1981).[31]

In appropriate circumstances, the common fund doctrine permits the court to require an insurance company to pay a proportionate share of the attorney's fees incurred by its insured in obtaining a judgment or settlement that satisfies the insurance company's subrogated interest. *Boston, Bates & Holt v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d at 35 (approving the application of the common fund doctrine where the insurance company took no active role in its insured's litigation against the tortfeasor); *see also Great-West Life & Annuity Ins. Co. v. Clingenpeel*, 996 F. Supp. 1353, 1357-58 (W.D. Okla. 1997); *Blue Cross Blue Shield v. Freeman*, 447 So. 2d 757, 759 (Ala. Civ. App. 1983); *United Servs. Auto. Ass'n v. Hills*, 109 N.W.2d 174, 177-78 (Neb. 1961). Thus, when an insurance company does not participate in its insured's action against a third party, it is entitled to its subrogation interest only after its insured has recovered its loss and its reasonable expenses incurred to obtain the recovery.[32] However, once an insurance company steps in and actively participates or assists in its insured's claim against the third party, its ride is no longer free, and it becomes a contributor to the common fund. *Indiana Union Mut. Ins. Group v. Smith*, 656 N.E.2d 538, 540 (Ind. Ct. App. 1995); *Dawson*, 87 Harv. L. Rev. at 1647; Michael Quinn, Essay, *Subrogation, Restitution, and Indemnity*, 78 Texas L. Rev. 1361, 1392 (1996).

An insurance company's limited appearance to protect its subrogation interest and no more will not shield the insurance company from the application of the common fund doctrine. *Principal Mut. Life Ins. Co. v. Baron*, 964 F. Supp. 1221, 1224 (N.D. Ill. 1997); *Alston v. State Farm Mut. Auto. Ins. Co.*, 660 So. 2d 1314, 1316 (Ala. Civ. App. 1995); *Castellari v. Partners Health Plan of Colo., Inc.*, 860 P.2d 593, 595 (Colo. Ct. App. 1993); *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d at

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[30](...continued)
children's lawyer to participate in the wrongful death action because Tenn. Code Ann. § 20-5-106(c) (Supp. 2001) gave their father's widow a superior right to bring the action).

[31]*See also Kenneth F. White, Chtd. v. St Alphonsus Reg. Med. Ctr.*, 31 P.3d 926, 930 (Idaho Ct. App. 2001); *York Ins. Group v. Van Hall*, 704 A.2d 366, 368 (Me. 1997); *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834, 839-40 (N.M. 1995); *Klacik v. Kovacs*, 268 A.2d 305, 308 (N.J. Super. Ct. App. Div. 1970); *Mahler v. Szucs*, 957 P.2d 632, 637 n.17 (Wash. 1998); *Federal Kemper Ins. Co. v. Arnold*, 393 S.E.2d 669, 671 (W.Va. 1990).

[32]*Blue Cross Blue Shield v. Freeman*, 447 So. 2d at 760; *Cockman v. State Farm Auto. Ins. Co.*, 854 S.W.2d 343, 344 (Ark. 1993); *Plut v. Fireman's Fund Ins. Co.*, 102 Cal. Rptr. 2d 36, 40 (Ct. App. 2000); *Motor Club Ins. Ass'n v. Bartunek*, 526 N.W.2d 238, 243 (Neb. Ct. App. 1995); *Ortiz v. Great Southern Fire & Casualty Ins. Co.*, 597 S.W.2d 342, 343-44 (Tex. 1980); *see also* 16 Ronald A. Anderson & Mark S. Rhodes, *Couch Cycolopedia of Ins. Law* § 61:47, at 131 (2d ed. 1983).

840. To avoid the application of the common fund doctrine, an insurance company must actively assist its insured in the creation, discovery, increase, or preservation of the common fund. *Blue Cross Blue Shield v. Freeman*, 447 So. 2d at 759-60; *Texas Farmers Ins. Co. v. Seals*, 948 S.W.2d 532, 533 (Tex. App. 1997). By the same token, because consent is not a necessary ingredient for the common fund doctrine,[33] an insurance company's insistence that it intends to protect its subrogation interest, without more, will not defeat the application of the common fund doctrine. *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916, 920-21 (Fla. Dist. Ct. App. 1964); *Taylor v. American Family Ins. Group*, 725 N.E.2d 816, 820 (Ill. App. Ct. 2000); *Lancer Corp. v. Murillo*, 909 S.W.2d at 129; Parker, 31 Ind. L. Rev. at 332.[34]

C.

The Tennessee General Assembly has the power to alter the common-law rules involving subrogation and the application of the common fund doctrine. One of the purposes of the 1980 enactment of Tenn. Code Ann. § 71-5-117(c) was to apply the common-law rules governing the common fund doctrine to the State's subrogation claims arising out of Medicaid payments for injuries caused by third parties. The purpose of the 2000 amendments to Tenn. Code Ann. § 71-5-117 was to clarify the application of these rules with regard to both the State's and private TennCare managed care organizations' subrogation claims. Tenn. Code Ann. § 71-5-117(g)-(j) makes it clear (1) that the common fund doctrine applies to the subrogation claims of TennCare managed care organizations, (2) that a TennCare recipient's lawyer may invoke the common fund doctrine, even if the TennCare managed care organization has undertaken to protect its own subrogation interests or has actively assisted in the creation, discovery, increase, or preservation of the common fund, and (3) that when the TennCare managed care organization has actively protected its own subrogation interest or otherwise actively participated in the insured's litigation against a third party, the trial court must equitably apportion the attorney's fees between the insured's lawyer and the managed care organization's lawyer.

Statutes are generally presumed to operate prospectively in the absence of clear legislative intent to the contrary; however, they may be applied retroactively if they are remedial or procedural in nature and if their retroactive application will not produce an unjust result. *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 368 (Tenn. 1998); *Kee v. Shelter Ins.*, 852 S.W.2d 226, 228 (Tenn. 1993). A statute is remedial or procedural if it addresses the means or method by which a legal right is enforced without affecting vested rights or liabilities. *Doe v. Sundquist*, 2 S.W.3d 919, 923-24 (Tenn. 1999); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d at 368. Thus, a statute that merely changes a rule of practice applies to all pending cases. *Frame v. Marlin Firearms Co.*, 514 S.W.2d 728, 730 (Tenn. 1974); *State Dep't of Human Servs. v. Defriece*, 937 S.W.2d 954, 958 (Tenn. Ct. App. 1996).

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[33] *Mahler v. Szucs*, 957 P.2d at 648.

[34] Rather than running the risk of working for free for an ungrateful non-client, lawyers may properly abandon an insurance company's subrogation interest and leave the insurance company to fend for itself. An insurance company's unequivocal insistence that it will protect its own subrogation interest gives the insured and the insured's lawyer every reason to formally disclaim any demand for the covered expenses, thereby throwing the burden and expense of collecting these expenses on the insurance company. *Blackburn v. Sundstrand Corp.*, 115 F.3d at 496.

The 2000 amendments to Tenn. Code Ann. § 71-5-117 took effect on May 24, 2000. They did not create a new claim for attorney's fees from a common fund because the Tennessee General Assembly had created that claim in 1980 when it enacted Tenn. Code Ann. § 71-5-117(c). They likewise do not disturb vested rights or liabilities because the subrogation interest either of the State or of a TennCare managed care organization had been subject to paying its share of the recipient's lawyer's attorney's fees for the past twenty years. These amendments simply clarified the procedure for calculating and paying the attorney's fees authorized in Tenn. Code Ann. § 71-5-117(c). Accordingly, the 2000 amendments to Tenn. Code Ann. § 71-5-117 apply to this proceeding even though it was commenced before May 24, 2000.

IV.
THE TRIAL COURT'S ATTORNEY'S FEE AWARD

Access MedPLUS asserts that the trial court erred by awarding Mr. Smith one-third of its $12,687 subrogation interest in Ms. Roberts's recovery from Mr. Sanders and his mother. While it does not take issue with the reasonableness of Mr. Smith's contingent fee arrangement with Ms. Roberts, Access MedPLUS insists that it should not be responsible for any of Mr. Smith's fees because it did not, directly or indirectly, authorize Mr. Smith to perform legal work on its behalf.

In the absence of a contract or statute, the decision to award attorney's fees and the amount of attorney's fees to be awarded are within the discretion of the trial judge. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995); *Albright v. Mercer*, 945 S.W.2d 749, 751 (Tenn. Ct. App. 1996); *Airline Constr., Inc. v. Barr*, 807 S.W.2d 247, 270 (Tenn. Ct. App. 1990). The reasonableness of a particular attorney's fee depends on the facts of the case. *Alexander v. Inman*, 903 S.W.2d 686, 695 (Tenn. Ct. App. 1995). Accordingly, we review a trial court's award of attorney's fees using the "abuse of discretion" standard of review. *Knox County ex rel. Schumpert v. Union Livestock Yard, Inc.*, 59 S.W.3d 158, 166 (Tenn. Ct. App. 2001); *Fell v. Rambo*, 36 S.W.3d 837, 853 (Tenn. Ct. App. 2000).

The "abuse of discretion" standard is a review-constraining standard of review that calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, ___S.W.3d ___, ___, 2000 WL 354404, at *3 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ .*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d at 927; *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court will be found to have "abused its discretion" only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Buckner v. Hassell*, 44 S.W.3d 78, 83 (Tenn. Ct. App. 2000); *In re Paul's Bonding Co.*, 62 S.W.3d 187, 194 (Tenn. Crim. App. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

Contrary to Access MedPLUS's assertion, the subrogee's consent or authorization is not an essential ingredient to the application of the common fund doctrine. After all, there would be no need for the doctrine if consent or authorization were required. *Mahler v. Szucs*, 957 P.2d at 648. The application of the doctrine hinges on four questions: (1) Is there a discrete fund which is in the court's control? (2) Is the class of persons benefitting from the fund relatively small in number and easily identifiable? (3) Can the benefits be traced with some accuracy? and (4) Can the costs of the litigation to shifted to the persons benefitting from the fund with some exactitude? In this case, the answer to each of these questions is yes.

This case involves a discrete fund in the control of the trial court – the $33,000 settlement with Mr. Sanders and his mother. There are only two members of the class that will benefit from this fund – Ms. Roberts and Access MedPLUS. The benefit to Access MedPLUS can be accurately traced – it is the $12,687 deposited in the court representing Access MedPLUS's subrogated interest in the settlement proceeds. Finally, the costs of the litigation can be shifted with precision by requiring Access MedPLUS to pay one-third of its subrogated interest in the settlement proceeds to Ms. Roberts's lawyer.

Because the record contains sufficient evidence to support a prima facie showing supporting the application of the common fund doctrine, Access MedPLUS had the burden of presenting evidence showing that it was entitled to claim an exception from the common fund doctrine. To carry this burden, Access MedPLUS was required to show that it was actively involved in the efforts to secure the settlement with Mr. Sanders and his mother. This Access MedPLUS failed to do.

The record demonstrates overwhelmingly that Access MedPLUS failed to act diligently to protect its own subrogation interest, let alone to assist in advancing Ms. Roberts's claim against Mr. Sanders and his mother. Other than two form letters, Access MedPLUS did not pursue the matter with Ms. Roberts, and it failed to even assert its subrogation rights until twenty months after the collision in which Ms. Roberts was injured.[35] The only evidence of any effort on behalf of Access MedPLUS to protect its subrogation interest in the proceeds of Ms. Roberts's litigation with Mr. Sanders and his mother is Innovative Recovery Services' self-serving May 12, 1998 letter stating that it was "protecting" Access MedPLUS's subrogation interest.

In light of this evidence, the trial court could easily have found that Mr. Smith did the lion's share of the work to obtain the common fund that benefitted both his client and Access MedPLUS. In fact, it would not be an overstatement to conclude that Mr. Smith did all of the work. Thus, Access MedPLUS and Innovative Recovery Services did nothing to contribute to the $33,000 settlement. Because Innovative Recovery Services failed to take issue with the reasonableness of Mr. Smith's one-third contingent fee agreement and failed to present any evidence of their contributions to the settlement, the trial court was justified in awarding Mr. Smith a full one-third share of the $12,687 being held by the trial court clerk pending the outcome of this dispute.[36]

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[35]This delay may very well have prevented Access MedPLUS from pursing its subrogation rights on its own had it ever decided to do so. It failed to pursue its subrogation interest against Mr. Sanders and his mother within one year from the date of the collision injuring Ms. Roberts.

[36]Tenn. Code Ann. § 71-5-117(g)-(k) was not enacted when the trial court decided this case. We have (continued...)

V.

We affirm the trial court's decision to award Mr. Smith one-third of Access MedPLUS's $12,687 subrogation interest in Ms. Roberts's settlement with Mr. Sanders and his mother and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal to Access MedPLUS and its surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE

[36](...continued)
concluded that the outcome would have been the same had it been in effect.